STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 17, 2012
v	No. 299877 Wayne Circuit Court
COREY LAMAR HINTON, Defendant-Appellant.	LC No. 10-003149-FC

Before: DONOFRIO, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree felony murder, MCL 750.316(1)(b), possession of a firearm by a felon (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b.[1] Because defendant waived appellate review of his claim of instructional error, he was not denied his rights to the effective assistance of counsel or to confront the witnesses against him, and his claims involving the underrepresentation of African-Americans in his jury venire lack merit, we affirm.

Defendant first argues that he was denied his constitutional rights to due process and a fair trial when the trial court instructed the jury that it could consider his previous, unnamed conviction when evaluating his testimony. Because defense counsel expressly approved the trial court's jury instructions, defendant waived appellate review of this issue. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). In any event, even reviewing this claim of error as merely unpreserved, rather than waived, relief is not warranted. "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error

[1] The jury also convicted defendant of second-degree murder, MCL 750.317, and armed robbery, MCL 750.529, but the trial court vacated those convictions on double jeopardy grounds.

seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence."[2] *Id.* (quotation marks, brackets, and citation omitted).

Defendant stipulated that he had previously been convicted of a felony and was ineligible to possess a firearm. The nature of the felony was not identified. Thereafter, defendant testified on his own behalf, and the prosecution attempted to question him regarding the conviction. Defense counsel objected immediately after the prosecution stated, "[a]nd have you been convicted in the last ten years –" The prosecution did not finish the question, and defendant did not answer it. The trial court held a sidebar conference off the record and concluded the proceeding for the day. The prosecution did not ask any further questions of defendant the following day, and, after both parties rested, the trial court instructed the jury as follows:

> You have heard, ladies and gentlemen, that the Defendant, Corey Hinton, has been convicted of a crime in the past. You should judge his testimony the same way you judge the testimony of any other witness. You may consider his past criminal convictions along with all the other evidence when you decide whether you believe his testimony and how important you think it is.

The prosecution argues that it is unclear from the record whether the instruction was erroneous because MRE 609 allows the admission of evidence involving a prior conviction for impeachment in certain circumstances. This argument is misplaced because evidence involving defendant's prior conviction was not admitted for impeachment purposes. Rather, defense counsel objected to the prosecution's attempt to question defendant regarding the previous conviction, and defendant never answered the question. Thus, the only evidence of defendant's prior conviction was his stipulation that he had previously been convicted of a felony that rendered him ineligible to possess a firearm. This Court has explained that, when a defendant stipulates to the commission of a prior felony for purposes of a felon-in-possession charge, the trial court may provide a limiting instruction directing the jury to give separate consideration to each count in the indictment, and the court may provide an instruction that the jury should consider the prior conviction only as it relates to the felon-in-possession charge. *People v Green*, 228 Mich App 684, 691-692; 580 NW2d 444 (1998). The trial court's instruction that the jury could consider defendant's previous conviction in evaluating his credibility constituted plain error.

Notwithstanding the error, reversal is not warranted because defendant has failed to establish prejudice. The evidence against defendant was strong. Defendant's four companions

[2] Defendant also asserted in his statement of the question presented that the trial court erred by failing to give a limiting instruction regarding the proper use of evidence involving his previous conviction. Defendant's failure to brief that issue and offer any argument in support of his claim of error results in his abandonment of the issue. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006). "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

in the van with him all testified that defendant was the only person with a gun and that no struggle or fight occurred before the shooting. Their testimony failed to corroborate defendant's claim that he acted in self-defense. Moreover, the victim was shot in the back, also contradicting defendant's claim of self-defense. Accordingly, even if defendant had not waived appellate review of this issue, he has failed to establish that the instructional error resulted in his conviction despite his innocence. *Carines*, 460 Mich at 763.

Defendant next contends that he was denied the effective assistance of counsel because his trial counsel failed to object to the jury instruction discussed above. Although defendant raises this argument under a separate heading in the argument section of his brief on appeal, it is not properly presented for our review because he failed to include it in his statement of questions presented. MCR 7.212(C)(5); *People v Unger*, 278 Mich App 210, 262; 749 NW2d 272 (2008). In any event, defendant's claim lacks merit because he has failed to establish prejudice.

Our review of defendant's ineffective assistance of counsel claim is limited to mistakes apparent on the record because defendant failed to raise it in the context of a motion for a new trial or evidentiary hearing. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). In order to establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that, absent counsel's errors, the outcome of the proceeding would have been different. *Id.* at 659.

As previously discussed, the outcome of the trial would not have been different had defense counsel objected to the erroneous jury instruction. With the exception of defendant's own self-serving testimony, the evidence showed that defendant shot an unarmed man in the back. Thus, defendant has failed to demonstrate a reasonable probability that, absent counsel's error, the outcome of the trial would have been different. *Sabin*, 242 Mich App at 659.

In his Standard 4 brief on appeal, defendant contends that the trial court abused its discretion by determining that the prosecution exercised due diligence in attempting to locate a witness, Brandon Crawford. Defendant also argues that he was denied his constitutional right to confront the witnesses against him when the trial court permitted Crawford's preliminary examination testimony to be read into the record at trial. We review for an abuse of discretion a trial court's determination whether the prosecution exercised due diligence in locating a witness. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes. *People v Carnicom*, 272 Mich App 614, 617; 727 NW2d 399 (2006). We review de novo whether a defendant was denied his constitutional right to confrontation. *People v Breeding*, 284 Mich App 471, 479; 772 NW2d 810 (2009).

Both the United States and Michigan Constitutions grant a criminal defendant the right to confront the witnesses against him. US Const, Am VI; Const 1963, art 1, § 20. The right, however, is not absolute, and face-to-face confrontation "must occasionally give way to considerations of public policy and the necessities of the case[.]" *Maryland v Craig*, 497 US 836, 844, 849; 110 S Ct 3157; 111 L Ed 2d 666 (1990) (quotation marks and citation omitted). In this vein, an unavailable witness's preliminary examination testimony is admissible as substantive evidence at trial if the prosecution exercised due diligence in attempting to produce

the witness. *Bean*, 457 Mich at 684. "The test is one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *Id.* "Where there are specific leads as to the witness' location, the prosecutor must pursue them." *People v Conner*, 182 Mich App 674, 681; 452 NW2d 877 (1990).

Here, the trial court did not abuse its discretion by finding that the prosecution and police exercised due diligence in attempting to locate and produce Crawford. Lieutenant Salas, the officer in charge, received Crawford's subpoena a couple of weeks before trial. He called Crawford using the same the telephone number he had previously used to contact Crawford, but the number no longer belonged to Crawford. He went to Crawford's home, but nobody answered the door. He returned to the home the following day and left the subpoena with a woman who identified herself as Crawford's aunt. The woman indicated that Crawford was on his way home. After trial began, Salas heard from other witnesses that Crawford might be in Texas. Salas telephoned Crawford using a different phone number that he had been given and left a voice mail message. The voice on the recording sounded like Crawford's voice, but Crawford did not return Salas's call. The police also ran a LEIN search, which revealed that Crawford's last known address was the home at which Salas delivered the subpoena.

Although the prosecution and police could have attempted to serve the subpoena sooner, there is no indication that there was difficulty procuring Crawford's testimony at defendant's preliminary examination, that the prosecution or police knew that Crawford was leaving the state, or that Crawford had an incentive to hide. See *People v Dye*, 431 Mich 58, 67, 76; 427 NW2d 501 (1988). A person who identified herself as Crawford's aunt told Salas that Crawford was on his way home, and Salas thus had no reason to believe that Crawford would not appear at trial. Moreover, when Crawford failed to appear, Salas made further efforts to locate him, including following up on a lead that he was in Texas. Although Salas did not contact Texas authorities, the inquiry is not whether more stringent efforts could have produced the witness. *Bean*, 457 Mich at 684. Accordingly, the trial court did not abuse its discretion by determining that the prosecution and police exercised due diligence in attempting to locate and produce Crawford, and defendant was not denied his right to confrontation.

Defendant next argues in his Standard 4 brief, that he was denied his constitutional rights to a jury drawn from a fair cross-section of the community, equal protection of the law, and effective assistance of counsel because the jury array included only four African-Americans and his trial counsel objected only verbally. We review de novo questions concerning the exclusion of minorities in jury venires. *People v McKinney*, 258 Mich App 157, 161; 670 NW2d 254 (2003).

"In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979); see also *People v Smith*, 463 Mich 199, 203; 615 NW2d 1 (2000). Courts employ a case-by-case

approach to determine whether the representation of a distinctive group was fair and reasonable. *Id.* at 204.

It is undisputed that "African-Americans are considered a constitutionally cognizable group for Sixth Amendment fair-cross-section purposes." *People v Hubbard (After Remand)*, 217 Mich App 459, 473; 552 NW2d 493 (1996). Thus, defendant has satisfied the first prong of the test. With regard to the second prong, however, defendant merely asserts that African-Americans were not fairly and reasonably represented in his jury venire. Defendant did not present evidence of the general underrepresentation of African-Americans in jury venires, and one case of alleged underrepresentation is insufficient to establish a prima facie violation. *People v Williams*, 241 Mich App 519, 526; 616 NW2d 710 (2000).

Further, defendant has failed to satisfy the third prong of the test, i.e., that the underrepresentation is the result of the systematic exclusion of the group in the jury selection process. Similar to the defendant in *Williams*, 241 Mich App at 526, defendant argues that he can satisfy this prong if a hearing is held on remand. As discussed in *Williams*, however, one or two incidents of disproportionality do not establish systematic exclusion. *Id.* Moreover, a "bald assertion that systematic exclusion must have occurred" is insufficient to support defendant's challenge. *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997). Defendant presented no evidence in the trial court regarding the underrepresentation of African-Americans in other Wayne County jury venires. On appeal, defendant argues that a Detroit News article supports his claim of systematic exclusion. As this Court stated in *McKinney*, 258 Mich App at 161 n 4, we "may not take judicial notice of newspaper articles as they constitute inadmissible hearsay." *Id.* at 161 n 4. Accordingly, defendant has failed to establish a prima facie violation of the fair cross-section requirement.

Defendant also argues that the underrepresentation of African-Americans in his jury venire violated his constitutional right to equal protection. To establish systematic discrimination under the equal protection clause, a defendant must:

> (1) show that the group excluded is a recognizable, distinct class capable of being singled out for different treatment under the laws, (2) prove the degree of underrepresentation by comparing the proportion of the excluded group in the total population to the proportion actually called to serve on the venire over a significant period, and (3) show that the selection procedure is either susceptible of abuse or not racially neutral. [*Williams*, 241 Mich App at 527-528.]

Even assuming that defendant has satisfied the first prong, he has failed to show underrepresentation over a significant period or that the selection procedure is susceptible to abuse or not racially neutral, as discussed above. See *Williams*, 241 Mich App at 528. Thus, defendant's argument fails.

Finally, defendant contends that the proper procedure for challenging a jury array is to challenge the array in writing before the jury is sworn and that trial counsel rendered ineffective assistance by failing to do so. In *Hubbard*, 217 Mich App at 464-465, this Court rejected the notion that a defendant must challenge a jury array in writing and specifically "decline[d] to adopt a rule that Sixth Amendment fair-cross-section challenges must be submitted to the trial

court in writing." Thus, trial counsel was not deficient for failing to assert his challenge in writing.

Affirmed.

/s/ Pat M. Donofrio
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause